87-2115

No. _____

SUPREME COURT OF THE UNITED STATES

October Term 1987

BEVERLY J. BAIRD
AND JERRY BAIRD,
.....PETITIONERS

versus

CHARLES J. BOHLE, M.D.
AND GYNECOLOGY ASSOCIATES,
P.S.C.,
.....RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether expert opinion testimony is admissible under Federal Rules of Evidence 702-705 to supply testimony in a medical negligence action that the defendant physician complied with the appropriate standard of care (or that he was "not negligent") during surgery on the plaintiff, when:

(1) the defendant himself cannot, and does not, testify that he complied with the standard of care, and when he cannot state any specific steps he employed during the surgery to comply with the standard of care; or

(2) the said opinion is based solely on medical records which do not describe the specifics of the surgery and wholly ignores the testimony of the defendant

physician regarding the measures he did, or did not, employ during the surgery.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the courts below were the same as those indicated by the caption of the case in this court.

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OPINION BELOW

The decision of the Court of Appeals is not a published opinion. See 841 F.2d 1125 (6th Cir. 1988).

JURISDICTIONAL STATEMENT

The Court of Appeals' decision was entered on March 8, 1988. (See Appendix A)

The statutory provision which confers jurisdiction on this Court to review the decision of the Court of Appeals is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fed. R. Evid. 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 704. Opinion on Ultimate Issue.

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Fed. R. Evid. 705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

STATEMENT OF THE CASE

This is a medical negligence action arising out of the injuries sustained by the Plaintiff, Beverly J. Baird, when she was operated on by the Defendant, Dr. Charles Bohle, on June 28, 1984. The case was brought in the Federal District Court for the Western District of Kentucky based on diversity of citizenship.

During the course of surgery to remove Mrs. Baird's ovaries, the Defendant, Dr. Bohle, cut out a one inch to two inch segment of Mrs. Baird's normal, healthy right ureter (the tube which drains urine from the kidney to the bladder and which, in the female, passes directly behind the ovaries).

The central issue at trial was whether Dr. Bohle's action in removing

this segment of normal, healthy ureter constituted a breach of acceptable medical practice. Dr. Bohle presented the testimony of three experts at trial, each of whom expressed the opinion that Dr. Bohle was "not negligent," or that he did not breach acceptable medical practice, when he cut out the segment of Mrs. Baird's ureter. Dr. Bohle himself could not, and did not, express such an opinion.

The case was tried before a jury, which returned a verdict for the Defendant. Judgment dismissing the Plaintiffs' Complaint was entered November 26, 1986. (See Appendix B)

The Plaintiffs filed post-judgment motions for a new trial and for judgment notwithstanding the verdict, both of which were denied by order of the trial court, Hon. Edward H. Johnstone, entered January 5, 1987. (See Appendix C)

Plaintiffs filed a Notice of Appeal to the Sixth Circuit Court of Appeals on January 22, 1987. On March 8, 1988 the Sixth Circuit entered an opinion *per curiam* affirming the judgment of the trial court. (See Appendix A)

Petitioners now seek certiorari in this Court to review the opinion of the Sixth Circuit.

Material Facts

Every physician who testified, at trial, five in all, including the Defendant, Dr. Bohle, agreed that acceptable medical practice in this case required Dr. Bohle to employ all reasonable measures to identify and avoid injury to Mrs. Baird's right ureter. (Dr. Bohle TR 1-207) Dr. Bohle admitted causing the injury to the ureter and he

admitted that he did not identify the portion of the ureter which he cut out. (Dr. Bohle TR 1-202; 1-209; 1-215; 1-228)

Thus, the only issue for the jury to resolve on the question of Dr. Bohle's negligence was whether Dr. Bohle's admitted failure to identify and avoid injury to the segment of Mrs. Baird's right ureter which he cut out was the result of his failure to employ all reasonable measures to identify and avoid injury to Mrs. Baird's right ureter, or, as Dr. Bohle argued, was simply an unavoidable consequence of the surgery.

Dr. Bohle's testimony on this issue was as follows:

(1) Dr. Bohle could not, and did not, say that he employed all reasonable measures to identify and avoid injury to Mrs. Baird's right ureter. (Dr. Bohle TR 2-81)

(2) Dr. Bohle admitted he could not state any specific measure he attempted to employ to identify and avoid injury to Mrs. Baird's right ureter. (Dr. Bohle TR 1-228, 1-229)

(3) Dr. Bohle admitted he did not identify all of Mrs. Baird's right ureter (Dr. Bohle TR 1-211); he could not say how much, if any, of the right ureter he was able to identify (Dr. Bohle TR 1-210) or how much of it he was not able to identify (Dr. Bohle TR 1-209); nor did he know whether or not it was possible for him to identify any part of Mrs. Baird's right ureter in the entire length of its course from the kidney down to the bladder (Dr. Bohle TR 1-209, 1-210); and

he could not even say whether or not he identified all the ureter that was reasonably identifiable in Mrs. Baird's case. (Dr. Bohle TR 1-210)

(4) Dr. Bohle admitted that the plaintiff's medical records, especially his operative note, fail to describe what measures, if any, he attempted to employ to identify Mrs. Baird's ureters (Dr. Bohle TR 1-228, 1-229), and that the operative note does not mention the ureters at all. (Dr. Bohle TR 1-209; 1-230)

(5) Dr. Bohle admitted that if he had identified all of Mrs. Baird's right ureter, it would not have been injured. (Dr. Bohle TR 1-208)

The "Opinions" Rendered By Dr. Bohle's Experts

1. Dr. Frank's Testimony

Dr. Franks was the first of Dr. Bohle's three experts to testify and was Dr. Bohle's office partner.

During his direct testimony, Dr. Franks expressed the "opinion" that he did not think Dr. Bohle "violated acceptable standards" in this case. (Dr. Franks TR 2-99)

However, when asked by Plaintiffs' counsel, "Are you able to say that Dr. Bohle in fact did not deviate from acceptable standards on that particular day at that particular time?" Dr. Franks responded, "No sir."[1] (Dr. Franks TR 2-

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[1] It is abundantly clear that Dr. Franks' "opinion" should have been excluded on the basis of this alone, and that such a fundamental matter should not require an appeal to this Court for its proper resolution. Sadly, however, such is not the case.

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Dr. Franks further testified that the fact that Dr. Bohle injured Mrs. Baird's ureter "does not mean that Dr. Bohle was performing negligently, in my opinion." (Dr. Franks TR 2-93)

Cross-examination of Dr. Franks clearly revealed that this "opinion" was founded upon the premise that an injury of the type which Dr. Bohle inflicted on Mrs. Baird's ureter can occur either as a result of negligence or as a result of an "honest error in judgment."

Dr. Franks admitted that in order for a physician to cause such an injury as a result of an "honest error in judgment," as opposed to negligence, the physician must have taken all reasonable measures up until the time that he makes the "honest

error in judgment."[2] (Dr. Franks TR 2-104)

In this case, Dr. Franks admits that he does not know: what Dr. Bohle's technique was on the occasion he operated on Mrs. Baird (Dr. Franks TR 2-102); what measures Dr. Bohle employed to identify Mrs. Baird's ureter (Dr. Franks TR 2-102); or what measures Dr. Bohle employed to avoid cutting out Mrs. Baird's ureter. (Dr. Franks TR 2-103)

2. Dr. Housman's Testimony

Dr. Housman was the second of Dr. Bohle's three experts to offer opinion testimony on behalf of Dr. Bohle.

On his direct examination, Dr.

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[2] On this matter, see such cases as *Clark v. United States*, 402 F.2d 950, 953 (4th Cir. 1968); *Smith v. Yohe*, 412 Pa. 94, 100, 194 A.2d 167, 173 (1963).

Housman expressed the "opinion" that the severing of Mrs. Baird's ureter "does not represent negligence on the part of Dr. Bohle or any physician" (Dr. Housman TR 2-122) and that "in reviewing this chart and reviewing this case, I cannot find any real areas of deviation from acceptable medical standards." (Dr. Housman TR 2-122)

Despite the above broad language, Dr. Housman admitted that the sole basis for his "opinion" was his review of Dr. Bohle's operative note and the pathology report. (Dr. Housman TR 2-122) To these he adds the statement that injury to the ureter is "just one of the inherent risks that one runs into in doing this surgery." (Dr. Housman TR 2-123)

On cross-examination, Dr. Housman testified that a physician should employ all the reasonable measures he can under

the circumstances of the case to prevent injuring a normal organ. (Dr. Housman TR 2-139)

Dr. Housman further stated that it was Dr. Bohle's decision to remove all of the tissue that he removed, as opposed to leaving a portion of the tissue, which caused the injury to Mrs. Baird's ureter (Dr. Housman TR 2-141, 2-142); and that Dr. Bohle should have made this decision based on all information available to him and after having employed all reasonable measures to identify and avoid injury to the ureter. (Dr. Housman TR 2-142)

Dr. Housman admitted that he, like Dr. Franks, does not know specifically what measures Dr. Bohle employed to identify the ureter when he operated on Mrs. Baird (Dr. Housman TR 2-139, 2-140) and that there is nothing in the medical records to indicate what measures Dr.

Bohle employed.[3] (Dr. Housman TR 2-140)

3. Dr. Cook's Testimony

Dr. Cook testified by way of videotape deposition taken prior to trial and, thus, of course, was totally ignorant of the trial testimony of Dr. Bohle and the pathologist, Dr. Raush.[4]

On direct examination, Dr. Cook was asked whether he found any indication or evidence that Dr. Bohle "violated acceptable standards of a physician specializing in gynecology in his

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[3] Again, this testimony alone was amply sufficient reason for the trial court to have excluded Dr. Housman's "opinion." See Note 1 supra.

[4] This fact should have disqualified Dr. Cook from expressing "opinions" about Dr. Bohle's "negligence," or his failure to comply with acceptable medical practice, in light of the trial testimony of Dr. Bohle (see Material Facts at pages 2-5 supra.) and of Dr. Raush (see Note 6 infra.) regarding his pathology report, upon which Dr. Cook placed significant reliance in forming his "opinion."

treatment and care of Mrs. Baird." (Depo. Dr. Cook, p. 35) Dr. Cook responded that he did not.[5] (Depo. Dr. Cook, p. 35)

On cross-examination, Dr. Cook agreed that, in performing the surgery on Mrs. Baird, Dr. Bohle should have employed all reasonable measures to avoid injuring the ureter (Depo. Dr. Cook, p. 81) and should have made every attempt to identify as much of the ureter as was possible. (Depo. Dr. Cook, pp. 105-106)

Dr. Cook further testified that, in any surgery, the surgeon's goal is to minimize the risk of injury to any of the surrounding normal and healthy organs (Depo. Dr. Cook, p. 80) and that a surgeon should employ all reasonable measures to

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[5] Dr. Cook based this testimony on his review of the plaintiff's medical records, primarily Dr. Bohle's operative note and the pathology report by Dr. Raush, and on his review of the deposition "summaries" and case "summary" submitted to him by Dr. Bohle's counsel. (Depo. Dr. Cook, pp. 38-39)

avoid injury to those organs. (Depo. Dr. Cook, p. 81)

He testified that a surgeon should do "everything in his power and judgment" to resect only that amount of tissue that he knows for a fact he can safely resect without injuring the ureter. (Depo. Dr. Cook, p. 108; emphasis added)

Dr. Cook did not testify, nor could he, that Dr. Bohle did the things in the surgery on Mrs. Baird which Dr. Cook stated that all surgeons should do in any surgery.

ARGUMENT

Reasons For Granting Certiorari

This Court should grant certiorari to review the opinion of the Sixth Circuit Court of Appeals in this matter because:

(1) the Court of Appeals has decided a significant question of federal law (ie, the admissibility, under the Federal Rules of Evidence, of expert opinions in medical negligence actions which supply testimony that the defendant complied with acceptable medical practice when the defendant himself cannot, and does not, say that he complied with acceptable medical practice) which has not been, but should be, settled by this Court; and

(2) the opinion so far departs from the accepted and usual course of judicial proceedings governing the admissibility of expert opinion testimony as to call for an exercise of this Court's power of supervision.

I. THE COURT OF APPEALS HAS DECIDED A SIGNIFICANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This case presents the unique question of whether Federal Rules of Evidence 702-705 will permit the defendant physician in a medical negligence action to introduce expert opinion testimony that he did not breach acceptable medical standards (or that he was "not negligent") during surgery on the plaintiff, when the defendant himself cannot, and does not, offer such testimony, and when the factual

basis for the expert's opinion:

(1) wholly ignores the testimony of the defendant physician regarding what measures he employed, or failed to employ, during the surgery; and

(2) is entirely grounded on the plaintiff's medical records, which are totally devoid of any description whatever of the measures employed, or not employed, by the defendant during the crucial aspects of the surgery.

Petitioners are not aware of any cases deciding this issue directly. Frankly, Petitioners do not believe the Sixth Circuit meant to strike out in this bold, new direction. However, this is the undeniable result of the Court's opinion.

If the Federal Rules of Evidence are

to be interpreted in the manner of the Sixth Circuit's decision in this case, it should only be after careful scrutiny by this Court.

II. THE COURT OF APPEALS' OPINION SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS GOVERNING THE ADMISSIBILITY OF EXPERT OPINION TESTIMONY AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Petitioners assert two basic problems with the Court of Appeals' opinion: (1) it is factually erroneous; and (2) even if it were not factually erroneous, it fails to address the fundamental issue raised by Petitioners, Plaintiff's below, of the admissibility, under the Federal Rules of Evidence, of Dr. Bohle's three experts' "opinions," in light of the fact that there is no factual support whatsoever for these opinions, and, indeed, the factual assumptions on which they are based

conflict with the testimony of Dr. Bohle himself.

Regarding the latter issue, it is submitted that the holding of the Court of Appeals, upholding the trial court's admission into evidence of the "opinions" of Dr. Bohle's experts, flies in the face of all current notions of expert opinion testimony - state or federal, common-law or statutory - and, as such, clearly calls for the exercise of this Court's supervisory powers over the federal district courts and courts of appeal.

A. Factual Errors In The Court Of Appeals' Opinion

The Court of Appeals states "on the negligence issue, there is substantial evidence that the ureter was encased in scar tissue, and that Dr. Bohle was not negligent when he inadvertently cut it."

(Appendix A, p. vii-viii)

This statement is patently false. Not only is there not "substantial evidence" that the ureter was "encased" in scar tissue, there is no such evidence. Indeed, the only evidence is that the ureter was not encased in anything, be it scar tissue or anything else.*

The only testimony conflicting with that of Dr. Raush is Dr. Bohle's initial assumption that the ureter was "encased" in scar tissue (Dr. Bohle TR 2-60), and that he "apparently" could not recognize it, or else he would not have cut it.

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* The pathologist, Dr. Raush, testified that "the outside of this (right) ureter was involved in this (inflammatory) process along one side" and that "it was not completely encased in any of the scar tissue." (Dr. Raush TR 2-13; emphasis added)

He further stated that, to the best of his knowledge, it was only the one side closest to the ovaries that was involved in the inflammatory process, and that as far as he could tell the rest of the ureter was a normal structure. (Dr. Raush TR 2-16)

(Dr. Bohle TR 2-66) However, Dr. Bohle admitted he could not tell the jury specifically how much of the ureter was in fact involved in the scar tissue. (Dr. Bohle TR 2-80)

Moreover, the only "evidence" that Dr. Bohle was "not negligent" when he "inadvertently" cut the ureter is the "opinion" testimony of Dr. Bohle's three experts, which the Plaintiffs assert is inadmissible.

These egregious factual errors in the Court of Appeals' Opinion point out the serious prejudice to Plaintiff's case which was caused by the admission into evidence of the clearly improper "opinions" of Dr. Bohle's three experts.[7]

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[7] It is submitted that both the Court of Appeals' opinion and the jury verdict can only be explained by the fact that Dr. Bohle's counsel argued repeatedly that the ureter was "encased" in scar tissue - despite Dr. Raush's uncontroverted testimony to the contrary - and his continuous references to the fact that three experts testified that Dr. Bohle

B. The Court Of Appeals' Fails To Address The Fundamental Issue Regarding The Admissibility Of Dr. Bohle's Experts' "Opinions"

It is beyond cavil that, based on Dr. Bohle's testimony as set forth above, no one can say that Dr. Bohle did, in fact, employ all reasonable measures to identify and avoid injury to Mrs. Baird's right ureter. Certainly, Dr. Bohle made no such assertion.

Despite the obvious and fundamental lack of facts regarding what Dr. Bohle did during the surgery on Mrs. Baird, Dr. Bohle's three experts were permitted to express their "opinions" that Dr. Bohle was "not negligent" or that he had

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was "not negligent" when he removed a 1" to 2" segment of Mrs. Baird's ureter.

It is beyond question that admitting the testimony of Dr. Bohle's experts was grossly prejudicial to the Plaintiff's case. See, e.g., *Faries v. Atlas Truck Body Mfg. Co.*, 797 F.2d 619 (8th Cir. 1986).

complied with acceptable medical practice (ie, had employed all reasonable measures to identify and avoid injury to Mrs. Baird's right ureter) during the surgery on Mrs. Baird.

It is unquestioned that, in rendering these "opinions," each of Dr. Bohle's experts: (1) wholly ignored Dr. Bohle's testimony, as set forth above; and (2) obtained the factual basis for his testimony exclusively from the medical records of the plaintiff's surgery.

It is further undisputed that the said medical records are totally devoid of any facts regarding the measures employed by Dr. Bohle to identify and avoid injury to Mrs. Baird's right ureter.

Under these circumstances, there is simply no factual support for the "opinions" of Dr. Bohle's experts, and no case, state or federal, can be found to

support the notion that these "opinions" are admissible expert testimony.

It is clear beyond peradventure that the Court of Appeals utterly failed to address - or even to grasp - this simple argument.[a]

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[a] The Court of Appeals couches plaintiffs' argument as follows: "Plaintiffs allege that it was error to allow these experts to testify that the doctor was not negligent because the witnesses did not have enough information on which to base such an opinion." (Appendix A, p. iii; emphasis added)

However, Plaintiffs did not assert that Dr. Bohle's experts "did not have enough information" on which to base their opinions. Rather, Plaintiffs argued that these experts: (1) had no factual information upon which to base their opinions (ie, they relied solely on the medical records); and (2) they totally ignored Dr. Bohle's testimony and relied upon factual assumptions (ie, their interpretations of the medical records) which were clearly contradicted by the evidence (ie, Dr. Bohle's testimony and Dr. Raush's testimony).

Moreover, the fact that Dr. Bohle's experts "concluded that, based on the information before them (ie, the medical records but not Dr. Bohle's testimony or Dr. Raush's testimony), they could find no negligence on the part of Dr. Bohle" (Appendix A, p. v) is precisely the problem about which Plaintiffs were complaining below, while the Court of Appeals turns this issue around and uses it as a key plank in upholding the trial court's admission of the objected

The Experts' "Opinions" Were Not Admissible Under The Federal Rules of Evidence

The Federal Rules of Evidence have, quite properly, liberalized the common-law rules relating to the admissibility of expert testimony, in line with the drafter's stated goal of permitting testimony which will assist the trier of fact.

The Federal Rules of Evidence do not, however, throw open the doors to the admission into evidence of each and every utterance which emanates from the lips of a professed "expert."

Fed. R. Evid. 702 permits opinion testimony by experts if it will assist the trier of fact to understand the evidence or to determine a fact in issue.

Fed. R. Evid. 703 provides that an

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to opinions!

expert may base his opinion upon "facts or data" not otherwise admissible in evidence (eg, hearsay), provided the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Finally, Fed. R. Evid. 704 abolishes the so-called "ultimate issue" rule and permits an expert to express an opinion which "embraces an ultimate issue to be decided by the trier of fact." However, the Advisory Committee's Note points out that:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact.... These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did

T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

The law is well-settled that an expert witness cannot express an opinion which is founded on conjecture or speculation.[9] Nor may such an opinion be based on facts assumed to be true which in fact are not,[10] nor on facts which

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[9] See, eg, *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir.), cert. denied, 426 U.S. 907 (1976); *Omaha Indian Tribe, Treaty of 1854, Etc. v. Wilson*, 575 F.2d 620, 642 (8th Cir. 1978), rev'd on other grounds, 442 U.S. 653 (1979); *Faries v. Atlas Truck Body Mfg. Co.*, 797 F.2d 619 (8th Cir. 1986); *Twin City Plaza v. Central Sur. & Ins. Corp.*, 409 F.2d 1195 (8th Cir. 1969); *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986); *LaRue v. National Union Elec.*, 571 F.2d 51 (1st Cir. 1978); *Calhoun v. Honda Motor Co.*, 738 F.2d 126 (6th Cir. 1984); *Thompson v. Southern Pac. Transp. Co.*, 809 F.2d 1167 (5th Cir.), cert. denied, 108 S. Ct. 76 (1987); *Kale v. Douthitt*, 274 F.2d 476 (4th Cir. 1960); *Logsdon v. Baker*, 366 F. Supp. 332 (D.C. 1973); *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705 (4th Cir. 1949).

[10] See, eg, *Rewis v. United States*, 503 F.2d 1202 (5th Cir. 1974), a medical malpractice action under the F.T.C.A. in which the opinions of three medical experts who testified for the government were

conflict with the testimony of the party on whose behalf the expert is providing testimony.[11]

Fed. R. Evid. 702

Under the facts of this case, the most Dr. Bohle's experts could ever properly testify to under Rule 702 is that the injury to Mrs. Baird could have occurred in the absence of negligence (ie, that the mere fact she was injured does not in itself mean Dr. Bohle was negligent).

This is not sufficient to establish that Dr. Bohle was in fact not negligent,

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held inadmissible; *Logsdon v. Baker*, 517 F.2d 174 (D.C. Cir. 1975); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987).

[11] See, eg, *Rewis v. United States*, 503 F.2d 1202 (5th Cir. 1974), discussed in Note 10 supra.; *Abramson v. Japan Air Lines*, 587 F. Supp. 1099 (D.N.J. 1983).

or that he complied with acceptable medical practice. See *Abille v. United States*, 482 F. Supp. 703, 709 (N.D. Cal. 1980).

Fed. R. Evid. 703

The Court of Appeals held the opinions of Dr. Bohle's experts were admissible under Rule 703 because the experts based their opinions on four things: (1) plaintiff's medical records from the surgery, (2) their own experience in this type of surgery, (3) the potential danger of this type of complication arising under similar conditions, and (4) the pre-trial summaries of the case prepared by defense counsel. (See Appendix A, p. v)

It cannot be seriously contended that pre-trial summaries of the case prepared

by defense counsel are "facts or data...of a type reasonably relied upon" by physicians in treating patients. Cf. Fed. R. Evid. 703 and Advisory Committee's Notes thereto. The Court of Appeals' inclusion of this element in its holding must be viewed as wholly superfluous and irrelevant.

Moreover, the expert's "own experience in this type of surgery" and their knowledge of "the potential danger of this type of complication arising under similar conditions" cannot possibly supply sufficient facts upon which to base an opinion regarding what Dr. Bohle did, or failed to do, in the surgery on Mrs. Baird.

Thus, the only empirical data to which the Court of Appeals refers in its recitation of the facts upon which Dr. Bohle's experts based their opinions is

the "Plaintiff's medical records from the surgery."

However, Dr. Bohle testified that the medical records, especially his operative note, fail to describe what measures, if any, he attempted to employ to identify Mrs. Baird's ureter (Dr. Bohle TR 1-228), and he can't say exactly what he did in this case because it's not written down. (Dr. Bohle TR 1-220)

Moreover, Dr. Bohle admits he didn't record anything in his operative note about the ureters, whether he had seen or tried to see them, or what manner he'd attempted to identify them, at all. (Dr. Bohle TR 2-81) In fact, the operative note doesn't mention the ureters at all. (Dr. Bohle TR 1-209; 1-230)

Thus, the medical records do not in any manner disclose what Dr. Bohle did, or did not do, to identify and avoid injury

to Mrs. Baird's right ureter.[12]

For cases excluding an expert's opinion under Rule 703 see: *Ricciardi v. Children's Hosp. Medical Center*, 811 F.2d 18 (1st Cir. 1987), medical malpractice action based on diversity of citizenship;

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[12] Dr. Bohle and his experts put great emphasis on the pathologist's report, which was contained in the plaintiff's medical records. However, this report does not describe any measures which Dr. Bohle employed during the surgery on Mrs. Baird.

Dr. Bohle's counsel argued throughout the trial (and in the Court of Appeals) that the pathologist's report described the ureter as "encased" in scar tissue. (See Note 7 supra.) The pathology report, in fact, merely states that "one of the sections of ovarian tissue includes two cross sections of normal ureter in the adjacent dense fibrous (ie, scar) tissue." (emphasis added)

Moreover, the testimony of the pathologist, Dr. Raush, makes it crystal clear that the ureter was involved in the scar tissue only on one side (the side nearest the ovary) and that the rest of the circumference of the ureter was not involved in the scar tissue, or in any manner obscured or abnormal. (See Note 6 supra.)

None of Dr. Bohle's experts heard the testimony of Dr. Raush and their "opinions," like the arguments of Dr. Bohle's counsel, totally ignored Dr. Raush's testimony.

Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir. 1987), action for personal injuries allegedly caused by exposure to pesticide; *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721 (6th Cir. 1981), automobile accident case based on diversity of citizenship; *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1267 (E.D.N.Y. 1985), wrongful death action for exposure to the chemical dioxin; *In re Swine Flu Immunization Products Liability Litigation*, 508 F. Supp. 897 (D.Colo. 1981), a strict liability action for injuries from swine flu inoculation.

Fed. R. Evid. 704

Under Rule 704 and Kentucky law, the only opinion which Dr. Bohle's experts

could properly express is whether or not Dr. Bohle complied with acceptable medical practice (not whether or not he was "not negligent").

However, both Dr. Franks and Dr. Housman were permitted to express an opinion that Dr. Bohle was "not negligent."[13]

Numerous cases have held medical experts' opinions couched in terms of "negligence" to be inadmissible under Rule 704.[14]

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[13] Dr. Franks testified on direct that the fact that Dr. Bohle injured Mrs. Baird's ureter "does not mean that Dr. Bohle was performing negligently, in my opinion." (Dr. Franks TR 2-93)

On his direct examination, Dr. Housman expressed the "opinion" that the severing of Mrs. Baird's ureter "does not represent negligence on the part of Dr. Bohle or any physician." (Dr. Housman TR 2-122)

[14] See *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981), a case which is factually almost identical to the instant case; *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467 (11th Cir. 1984), a medical malpractice action founded on diversity of citizenship; *Bender v. Dingwerth*, 425

The standard which should have been applied in this case is that set forth in *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966), a medical negligence action under the F.T.C.A., wherein the Court stated:

> ...Only the standard of care is to be established by the testimony of experts. If under the undisputed facts the defendant failed to meet that standard it is not for the expert but for the Court to decide whether there was negligence.

868 F.2d 626, 632 (4th Cir. 1966).

F.2d 378 (5th Cir. 1970), medical malpractice action interpreting Texas law; *Gallagher v. Parshall*, 97 Mich. App. 654, 296 N.W.2d 132 (1980), personal injury action.

See also: *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Marx & Co. v. Diner's Club*, 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977).

CONCLUSION

For the reasons stated herein, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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for Petitioners

APPENDIX A

No. 87-5099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEVERLY J. BAIRD and
JERRY BAIRD,

Plaintiffs-Appellants,

v.

On Appeal from
the United States
District Court for
the Western District
of Kentucky.

CHARLES J. BOHLE, M.D. and
GYNECOLOGY ASSOCIATES, P.S.C.,

Defendants-Appellees.

BEFORE: ENGEL, MERRITT AND KENNEDY, Circuit Judges.

PER CURIAM. Plaintiffs, Beverly and Jerry Baird, appeal from the judgment for defendants entered on the jury verdict in this medical malpractice action. The

Bairds essentially claim that the United States District Court for the Western District of Kentucky made two reversible errors. First, they argue that the trial court abused its discretion in admitting expert testimony from three doctors who testified that defendant Dr. Bohle was not negligent. Second, they argue that the District Court should have granted plaintiffs' request for a directed verdict on the issues of negligence or malpractice and informed consent. After careful review of the record, we find no error, and AFFIRM.

This case arose after Beverly Baird was injured during an operation to remove her ovaries. During the operation, the defendant inadvertently cut her ureter which was partially encased in scar tissue. The primary issue at trial was whether the doctor was negligent by not

identifying and protecting the ureter from harm. During trial, both plaintiffs and defendants introduced expert witnesses to testify as to the appropriate standard of care in these operations, and as to whether Dr. Bohle acted negligently. After the District Court denied plaintiffs' motion for a directed verdict, the case was submitted to the jury, which found in favor of the defendant on all counts.

Plaintiffs first claim that the District Court improperly admitted testimony from two of defendants' medical experts who concluded that Dr. Bohle was not negligent. Plaintiffs allege that it was error to allow these experts to testify that the doctor was not negligent because the witnesses did not have enough information on which to base such an opinion. Plaintiffs argue that every

physician who testified whether for plaintiffs or defendants agreed that it was Dr. Bohle's duty to identify and avoid injury to her ureters. Therefore, since Dr. Bohle himself could not state any specific measure that he employed during the surgery to identify and avoid injury to her right ureter, plaintiffs claim that it would be impossible for the experts who were not there, to conclude that defendant acted responsibly.

Plaintiffs' argument misconceives the requirements of Rule 703 of the Federal Rules of Evidence, which states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 703.

In this case, the experts who testified on defendants' behalf based their opinions on plaintiffs' medical records from the surgery, their own experience in this type of surgery, the potential danger of this type of complication arising under similar conditions, and the pre-trial summaries of the case prepared by defense counsel. The experts concluded that, based upon the information before them, they could find no negligence on the part of Dr. Bohle because the ureter was encased by scar tissue, and thus very difficult, if not impossible to locate and protect.

Plaintiff claims that this information was not enough for an expert to base an opinion of no negligence. Yet, plaintiffs' own experts relied on nearly identical information for their opinions that Dr. Bohle did negligently perform the

operation. Since plaintiffs present no evidence that this type of information is not normally relied upon in these cases, and because their own experts relied on the same records and similar case summaries, we must conclude that this information meets the requirements of Rule 703 that it be "of a type reasonably relied on by experts in the particular field." Id.

While we agree that defendants' experts may not have had enough information to be absolutely certain of their conclusions, we see any alleged weaknesses in their testimony as going to the weight of their testimony and not its admissibility. As the Tenth Circuit said in a similar case where appellants challenged the admission of expert testimony, "these witnesses were fully examined, both on direct and extended

cross-examination, on all matters.... Whether either doctor was proceeding on an erroneous assumption is at most a debatable matter. In any event, the jury heard all of this, and we are not inclined to distrub its determination of the matter. Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980).

Plaintiffs also allege that the District Court erred by not granting their motion for a directed verdict on either the negligence, or the informed consent issues. We find no merit in these claims. Motions for directed verdicts will be granted "[o]nly when it is clear that reasonable men could but come to one conclusion from the evidence...[viewed] in a light most favorable to the party against whom it is made." Coffy v. Multi-County Narcotics Bureau, 600 F.2d 570, 579 (6th Cir. 1979). On the negligence issue,

there is substantial evidence that the ureter was encased in scar tissue, and that Dr. Bohle was not negligent when he inadvertently cut it. The fact that three experts testified that they found no negligence in the procedures used in the operation creates a question for the jury, no matter what plaintiffs' experts concluded.

The same can be said for plaintiffs' argument that Dr. Bohle was negligent as a matter of law because he failed to inform Mrs. Baird that her ureter may be damaged during the surgery. The testimony of all of the experts makes clear that standard medical procedure did not require Dr. Bohle to warn her about possible damage to the ureter because the likelihood of such damage was so small.

For these reasons, we AFFIRM the judgment below.

MANDATE ISSUED: 05/05/88

COSTS TAXED: NONE

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KY AT PADUCAH

BEVERLY J. BAIRD and
JERRY BAIRD

v

Civil Action No.
85-0137 P(J)

CHARLES J. BOHLE, M.D.
GYNECOLOGY ASSOCIATES

EDWARD H. JOHNSTONE, JUDGE

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

That the action herein is dismissed, the jury having found no liability on the part

of the defendant, Dr. Charles J. Bohle, M.D. and Gynecology Associates.

CLERK

JESSE W. GRIDER

(BY) DEPUTY CLERK

/S/ JOAN MOORE

DATE

11/20/86

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action No. C85-0137P(J)

BEVERLY J. BAIRD and
JERRY BAIRD PLAINTIFFS

VS.

CHARLES J. BOHLE, M.D., and
GYNECOLOGY ASSOCIATES, P.S.C. DEFENDANTS

ORDER OVERRULING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND PLAINTIFFS' MOTION FOR A NEW TRIAL

The Court having conducted the trial of this action and heard the evidence thereat, having reviewed Plaintiffs' Motion for Judgment Notwithstanding the Verdict and Plaintiffs' Motion for a New Trial and having reviewed Defendants' Response to said Motions and being sufficiently advised, IT IS HEREBY ORDERED that Plaintiffs' Motion for Judgment

Notwithstanding the Verdict and Plaintiffs' Motion for a New Trial be, and they hereby are, over-ruled.

Entered this 30th day of December, 1986.

/s/ Edward H. Johnstone
Edward H. Johnstone, Judge
United States District Court
Western District of Kentucky